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Murugan a/l Muniandy v Public Prosecutor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 62–209 OF 2008
AMELIA TEE ABDULLAH J
7 MAY 2014

Criminal Law — Police Act — s 27(5) — Being in unlawful assembly in public place — Appeal against conviction and sentence — Whether failure of prosecution to call investigating officer as witness fatal — Whether elements of offence under s 27(5) of the Police Act 1967 proven — Defence not casting doubt on prosecution's case — Whether conviction safe

Criminal Law — Unlawful assembly — Whether accused took part in unlawful assembly or merely being found at unlawful assembly — Whether elements of offence under s 27(5) of the Police Act 1967 proven — Police Act 1967 s 27(5)(a)

Criminal Procedure — Sentencing — Appeal against sentence — Being in unlawful assembly in public place

The appellant was charged with an offence under s 27(5)(a) of the Police Act 1967 ('the Act') for having being in an unlawful assembly in a public place for which no licence had been issued under s 27(2) of the Act. ACP Ahmad Amir (PW13) testified as to the receipt of an application for a licence from one Vasantha Kumar for holding an assembly in front of the British High Commission. PW13 had refused the issue of such licence. Nevertheless, a group of about 600 Indians had gathered in the vicinity of Kg Berembang, Jalan Ampang and had headed towards the British High Commission. The group had failed to disperse despite warnings from the police. The appellant's defence was that he was present at the assembly in innocent circumstances. The appellant was found guilty and was convicted. The appellant was sentenced to 14 days imprisonment with effect from the date of sentence and a fine of RM2,000, in default to 30 days imprisonment. The appellant appealed against his conviction and sentence, inter alia, on the ground that the prosecution did not call the investigating officer ('IO') as a witness. It was submitted that the IO's presence was necessary to explain the investigations that were carried out by him to prove the charge against the appellant. The appellant also claimed that the learned trial judge ('judge') had failed to consider the appellant's plea in mitigation that he was a first offender with no previous conviction record.

Held, dismissing the appellant's appeal:

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(1) While it is true that the prosecution is at liberty to call whoever and however many witnesses it chooses so to do, the only limitation imposed upon it is that it must call 'all necessary witnesses' to prove its case. If the prosecution chooses not to call certain witnesses and those witnesses are subsequently found to be absolutely necessary to prove the essential ingredients of the charge, it is the prosecution that will have to suffer the consequences of failing to call such witness or witnesses (see para 17); *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433 referred.

(2) For an offence under s 27(5) of the Act, the prosecution would have to prove the following: (a) That there was an unlawful assembly; and (b) That the appellant was found in the unlawful assembly (see para 18).

(3) The prosecution had adduced evidence through PW13 that no licence was issued to the applicant, Vasantha Kumar, for holding an assembly in front of the British High Commission. The decision not to issue the licence was duly informed to the applicant. The prosecution had established that the HINDRAF assembly on 25 November 2007 was an illegal assembly and also that the information about the proposed assembly or rally not having been issued with a licence had been duly disseminated to the public at large (see para 19).

(4) As far as the second ingredient was concerned, the evidence of PW19 and PW20 clearly established the presence of the appellant at the unlawful assembly. The evidence of PW19 and PW20 were not inherently incredible. Their evidence corroborated each other. There was no reason whatsoever to disbelieve that the appellant was in the middle of the unlawful assembly and had attempted to avoid arrest by running to, and clinging on or hugging a water cannon (see paras 20–21).

(5) Taking into account the nature of the charge against the appellant and the nature of the evidence adduced by the prosecution in this case, in the circumstances of this case, the failure to call the IO was not fatal to the prosecution case (see para 23).

(6) The appellant's defence did not cast a doubt as to the truth of the prosecution's case. Hence, the judge was not in error when he found the appellant guilty and convicted him on the charge under s 27(5) of the Act (see para 36).

(7) The fine of RM2,000 was the minimum fine under s 27(8). Even considering the appellant's clean record, the sentence of 14 days' imprisonment was a far cry from the maximum imprisonment sentence of one year. In light of the evidence adduced as regards the conduct of the appellant at the illegal assembly, the sentence imposed on the appellant was not manifestly excessive (see para 39).

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[Bahasa Malaysia summary

Perayu dipertuduh dengan kesalahan di bawah s 27(5)(a) Akta Polis 1967 ('Akta') kerana berada dalam perhimpunan haram di tempat awam di mana tiada lesen dikeluarkan di bawah s 27(2) Akta tersebut. ACP Ahmad Amir (PW13) memberi keterangan mengenai penerimaan satu permohonan untuk lesen daripada Vasantha Kumar untuk mengadakan perhimpunan di hadapan Suruhanjaya Tinggi British. PW13 enggan mengeluarkan lesen tersebut. Namun begitu, kira-kira sekumpulan 600 orang India berkumpul di sekitar Kg Berembang, Jalan Ampang dan menuju ke arah Suruhanjaya Tinggi British. Kumpulan tersebut gagal bersurai walaupun diberi amaran oleh pihak polis. Pembelaan perayu adalah dia hadir di perhimpunan dalam keadaan tidak bersalah. Perayu didapati bersalah dan disabitkan. Perayu dijatuhi hukuman penjara 14 hari bermula daripada tarikh hukuman dan denda sebanyak RM2,000, sekiranya ingkar membawa kepada hukuman penjara 30 hari. Perayu merayu terhadap sabitan dan hukumannya, antara lainnya, atas alasan bahawa pendakwa raya tidak memanggil pegawai penyiasat ('PP') sebagai seorang saksi. Dihujahkan bahawa kehadiran PP adalah penting untuk menerangkan penyiasatan yang dijalankan olehnya untuk membuktikan pertuduhan terhadap perayu. Perayu juga mendakwa bahawa hakim bicara yang bijaksana gagal untuk mempertimbangkan rayuan mitigasi perayu bahawa dia merupakan pesalah kali pertama tanpa rekod sabitan terdahulu.

Diputuskan, menolak rayuan perayu:

(1) Walaupun adalah benar bahawa pendakwa raya bebas untuk memanggil sesiapa sahaja dan sebanyak mana saksi yang dipilih untuk berbuat demikian, had yang dikenakan ke atasnya hanyalah bahawa ia perlu memanggil 'semua saksi penting' untuk membuktikan kesnya. Sekiranya pendakwa raya memilih untuk tidak memanggil saksi-saksi tertentu dan saksi-saksi tersebut kemudiannya didapati sememangnya penting untuk membuktikan inti pati utama pertuduhan, pendakwa raya yang perlu menanggung akibat kegagalan untuk memanggil saksi atau saksi-saksi tersebut (lihat perenggan 17); *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433 dirujuk.

(2) Untuk kesalahan di bawah s 27(5) Akta, pendakwa raya perlu membuktikan seperti berikut: (a) bahawa terdapat satu perhimpunan haram; dan (b) bahawa perayu didapati berada dalam perhimpunan haram (lihat perenggan 18).

(3) Pendakwa raya mengemukakan keterangan melalui PW13 bahawa tiada lesen dikeluarkan kepada pemohon, Vasantha Kumar, untuk mengadakan satu perhimpunan di hadapan Suruhanjaya Tinggi British. Keputusan untuk tidak mengeluarkan lesen dengan sewajarnya dimaklumkan kepada pemohon. Pendakwa raya telah membuktikan bahawa perhimpunan HINDRAF pada 25 November 2007 merupakan

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satu perhimpunan haram dan juga bahawa maklumat mengenai perhimpunan atau demonstrasi yang tidak dikeluarkan lesen telah dimaklumkan dengan sewajarnya kepada khalayak umum (lihat perenggan 19).

(4) Sejauhmana intipati kedua berkenaan, keterangan PW19 dan PW20 jelas membuktikan kehadiran perayu di perhimpunan haram tersebut. Keterangan PW19 dan PW20 memang tidak boleh dipercayai. Keterangan mereka menyokong satu sama lain. Tiada alasan bagaimanapun untuk tidak mempercayai bahawa perayu berada di tengah-tengah satu perhimpunan haram dan cuba untuk mengelak tangkapan dengan berlari dan berpaut kepada atau memeluk penyembur air (lihat perenggan 20–21).

(5) Dengan mengambil kira sifat pertuduhan terhadap perayu dan sifat keterangan yang dikemukakan oleh pendakwa raya dalam kes ini, menurut keadaan kes ini, kegagalan untuk memanggil PP tidak menjejaskan kes pendakwa raya (lihat perenggan 23).

(6) Pembelaan perayu tidak memberikan keraguan ke atas kebenaran kes pendakwa raya. Oleh itu, hakim tidak terkhilaf apabila beliau mendapati perayu bersalah dan disabitkan atas pertuduhan di bawah s 27(5) Akta (lihat perenggan 36).

(7) Denda RM2,000 adalah denda minimum di bawah s 27(8). Walaupun dengan mempertimbangkan rekod bersih perayu, hukuman penjara 14 hari adalah jauh berbeza dengan penjara maksimum selama setahun. Merujuk kepada keterangan yang dikemukakan berhubung tindakan perayu di perhimpunan haram, hukuman yang dikenakan ke atas perayu ternyata tidak berlebihan (lihat perenggan 39).]

Notes

For a case on s 27(5) of Police Act, see 4(2) *Mallal's Digest* (4th Ed, 2012 Reissue) para 3230.

For a case on whether accused took part in unlawful assembly or merely being found at an unlawful assembly, see 4(2) *Mallal's Digest* (4th Ed, 2012 Reissue) para 3560.

For cases on appeal against sentence, see 4(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 3823–3939.

Cases referred to

PP v Mohamed Ali [1962] 1 MLJ 257 (refd)
PP v Saimin & Ors [1971] 2 MLJ 16 (refd)
Ti Chuee Hiang v PP [1995] 2 MLJ 433; [1995] 3 CLJ 1, SC (refd)

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Legislation referred to

Penal Code ss 143, 145
Police Act 1967 s 27(5), 27(5)(a), (5B), (8)

M Visvanathan (Saibullah MV Natyhan & Co) for the appellant.
Yusaini Amer (Diar Izda Yasmin with her) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Amelia Tee Abdullah J:

DECISION

[1] The appellant, Murugan a/l Muniandy, initially faced charges, namely for offences under ss 143 and 145 of the Penal Code and an alternative charge under s 27(5)(a) of the Police Act 1967. At the end of the prosecution case, the learned sessions court judge ('HMS') had found that the prosecution had failed to make out a prima facie case against the appellant for the offences under ss 143 and 145 of the Penal Code and had acquitted and discharged him without calling for his defence. No appeal has been filed by the public prosecutor against this decision of the HMS.

[2] However, the learned HMS had found a prima facie case made out on the alternative charge under s 27(5) of the Police Act 1967 and had called on the appellant to enter upon his defence. At the end of the defence case, the learned HMS found that the defence of the appellant had not cast a reasonable doubt as to the truth of the prosecution case and he found the appellant guilty and had convicted him accordingly. After hearing and considering the appellant's mitigation, the accused was sentenced to 14 days' imprisonment with effect from the date of sentence and a fine of RM2,000, in default to 30 days imprisonment. Being dissatisfied, the appellant now appeals against his conviction and the sentence.

[3] In light of the fact that there is no appeal by the public prosecutor in respect of the acquittal and discharge in relation to the two Penal Code offences, for this appeal the court will confine its consideration to the Police Act offence only. Thus, the charge against the appellant reads as follows:

> Bahawa kamu pada 25 November 2007 di antara jam 7.00 pagi hingga 9.00 pagi, di persimpangan lampu isyarat Jalan Ampang, dalam Bandaraya Kuala Lumpur, di dalam Wilayah Persekutuan Kuala Lumpur, telah didapati berada dalam satu perhimpunan yang menyalahi undang-undang; iaitu, satu perhimpunan di satu tempat awam di mana tiada lesen dikeluarkan di bawah seksyen 27(2) Akta Polls 1967 [Akta 334], dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 27(5)(a) Akta Polls 1967 dan boleh dihukum di bawah seksyen 27(8) Akta yang sama.

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An offence under s 27(8) carries with it a fine of not less than RM2000 and not more than RM10,000 and imprisonment not exceeding one year.

[4] From the appeal records, the court notes the following salient evidence which was adduced from the prosecution's witnesses. ACP Ahmad Amir bin Mohd Hashim ('PW13'), the *Ketua Polis Daerah* Cheras, had testified as to the receipt of an application for a licence from Vasantha Kumar a/l Krishnan for holding an assembly in front of the British High Commission at No 185, Jalan Ampang Kuala Lumpur. PW13 had refused the issue of such licence on grounds that:

> permohonan adalah daripada perseorangan dan pertubuhan yang didaftarkan maka diragukan tidak dapat kawal dan mengganggu lalulintas dan ketenteraman awam.

[5] The rejection of the application for a licence was duly informed to the applicant vide letter. And on 20 November 2007, PW13 held a press conference to inform that the police had not issued a permit for the assembly. Further on 23 November 2007 at 6pm, PW13 had directed Cif Insp Jaafar bin Mohd Noah to paste a copy of a *Perintah Larangan* dated 22 November 2007 which had been issued by a magistrate.

[6] PW13 had testified that on 25 November 2007 at about 5.40am he had received information about a group of about 600 Indians who had gathered in the vicinity of Kg Berembang, Jalan Ampang and were heading towards the British High Commission. PW13 proceeded to the scene and there he had given warning to the crowd gathered to disperse within 20 minutes. His order to disperse was repeated after 20 minutes. When the crowd still did not disperse, PW13 directed the FRU to fire the water cannons.

[7] Evidence was also adduced from *Penolong Kanan Pesuruhjaya Polis* II, Dato' Roslan bin Ahmad ('PW15'), the FRU Commander at the material time who was involved in the Ops Padam to handle the demonstration by the Hindu Rights Action Force ('HINDRAF'). On 25 November 2007 at about 4am, he headed for the junction of Jalan Tun Razak and Jalan Ampang. On his way, he observed an unusually large number of Indians sitting in groups along the entire stretch of Jalan Ampang. He directed them to disperse and return home but they answered that they were waiting for friends.

[8] PW15 reported the situation via telephone to the *Pemangku Keselamatan Dalam Negeri dan ketenteraman Awam* ('KDNKA') and they were of a like mind that the crowd had to be dispersed. He then sought instructions from the Pemangku OCPD Dang Wangi, Superintendent Che Hamzah bin Hj Che Ismail ('PW14'). He observed ACP Che Hamzah giving warnings to the crowd

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to disperse through a loud hailer. The crowd did not disperse. On the contrary, they were noisy and some even booed the police.

[9] ACP Che Hamzah bin Hj Che Ismail (PW14) was at the location of the Stesen LRT Ampang on the day in question. He testified as to his using a loud hailer to warn those present in Bahasa Malaysia to disperse in 20 minutes. He had identified himself as the Acting KPD Dang Wangi and warned them that they were gathering without a police permit. The distance between PW14 and the groups gathered was about 5 to 10 meters. He gave the warning three times at five minute intervals. After the 15 minutes, he had given them another 15 minutes before directing the FRU who were on standby to spray the crowd with water from the water cannons. There were some who dispersed after that, although there were others who refused to disperse but who had screamed and shouted ('bertempik dan bersorak-sorak').

[10] However, the most material evidence in the case against the appellant came from Corp Zulkifli bin Rahmat (PW19) and Corp Mohd Suhaimy bin Omar (PW20). At the material time in 2007, PW19 was actually stationed at IPK Malacca. However, on 24 November 2007, he had received instructions from the TKJSJ (Operations) to carry out special duties in respect of Ops Padam in Kuala Lumpur.

[11] After a briefing, PW19 was tasked with two others (DK 122385 Mohd Suhaimi bin Omar and LK 140479 Nor Azmi bin Zakaria) to carry out arrests at an area close to the Balai Polis Tun Razak.

[12] They arrived at the Balai Polis Tun Razak at about 7am and were tasked with carrying out observations along Jalan Ampang near to Ampang Park. He observed groups of Indians, both male and female gathered. He estimated the number at about 2000-3000 persons. Some of the persons were aggressive, screaming and shouting in Tamil and with their hands in the air.

[13] At about 7.40pm, he had directed his attention to a group of men who were in the middle of the road, screaming and shouting. PW19 testified that he heard orders from a loud hailer from ACP Dato Roslan calling on the group to disperse immediately or force would be used. The orders or warnings were given five times, once every five minutes. However, the group of men did not disperse but continued to shout and scream. After that the water cannons were used, twice, but the group still refused to disperse.

[14] PW19 had testified as to his arrest of the appellant. He had carried out observations on the appellant for about 10 to 15 minutes from the side of the road. There was a group who had refused to disperse and were sitting in the middle of the road as can be seen in photograph 41. The appellant was dressed

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in a light blue T-shirt and dark trousers, about 5ft in height, with a moustache and a slight 'jambang'. The following is PW19's account of the actual arrest of the appellant:

> Apabila kami nak tangkap lelaki tersebut mengangkat tangan dan dia kata 'tangkaplah saya' dan terus meluru pergi ke kenderaan water canon. Lelaki tersebut telah memegang besi bahagian depan kenderaan water cannon. Saya bersama anggota terus tangkap dia, dia cuba melawan, dia enggan kerjasama. Dia pegang besi water canon dan tidak melepaskan besi water canon ini. Untuk menggari dia, dia tak mahu lepas daripada kenderaan dan perlu anggota yang ramai nak gari tangan dia ke belakang.

[15] The evidence of Corp Mohd Suhaimy bin Omar (PW20) who was with PW19, would corroborate the evidence of PW19 in material particulars. His evidence as regards the arrest of the appellant appears as follows:

> Saya menumpukan kepada sesiapa yang masih enggan bersurai dan bertindak agresif. Ada terima arahan barulah team kami pergi menangkap. Saya perhati perbuatan lebih kurang 15-30 minit. Saya tumpukan seseorang lelaki India yang masih berdegil. Dia masih enggan bersurai dan perpaut pada bahagian hadapan 'water canon'. Saya boleh ingat lelaki tersebut. Lelaki tersebut muka bulat, tinggi lebih kurang 5 kaki 3 inci dan badan gempal. Bangsa India, anggaran umur lebih kurang 40an. Pakaian yang digunakan pada hari kejadian ialah warna biru gelap. Pakaian lain saya tidak cam.

[16] During the hearing of the appeal, the appellant has raised the issue of the prosecution not calling the investigating officer as a witness in this case. Learned counsel has submitted that the investigating officer is an important witness and his absence would have prejudiced the defence. It was submitted that the investigating officer's presence was necessary to explain the investigations that were carried out by him to prove the charge against the appellant. In support of this argument, learned counsel relied on the case of *Ti Chuee Hiang v Public Prosecutor* [1995] 2 MLJ 433; [1995] 3 CLJ 1 where the Court had dealt with the issue of the calling of witnesses. In that case, the Supreme Court had stated as follows:

> Having said that, it is in our view clear law that while the prosecution has a complete discretion as to the choice of witnesses to be called at the trial (see *Adel Muhammed el Dabbah v A-G (Palestine)* [1994] AC 156 at 167-9) the most basic limitation upon prosecutorial discretion in the presentation of a case is that it also has a duty to call all of the necessary witnesses to establish proof against the accused beyond all reasonable doubt, and if, in the exercise of its discretion, it fails to fulfil this obligation which is nothing less than a statutory duty — the accused must be acquitted.

[17] The court is in full agreement with the decision in the afore-stated case. While it is true that the prosecution is at liberty to call whoever and however

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many witnesses it chooses so to do, the only limitation imposed upon it is that it must call 'all necessary witnesses' to prove its case. If the prosecution chooses not to call certain witnesses and those witnesses are subsequently found to be absolutely necessary to prove the essential ingredients of the charge, it is the prosecution that will have to suffer the consequences of failing to call such witness or witnesses.

[18] In this case, the court has carefully considered whether the investigating officer is an essential witness in this case. For an offence under s 27(5) of the Police Act 1967, the prosecution would have to prove the following:

(a) that there was an unlawful assembly; and

(b) that the appellant was found in the unlawful assembly.

[19] In this case, the prosecution had adduced evidence through PW13 that no licence was issued to the applicant, Vasantha Kumar a/l Krishnan, for holding an assembly in front of the British High Commission. The decision not to issue the licence was duly informed to the applicant. Further, a press conference was held to disseminate the information to the public at large that no licence had been issued for the rally, which would have made it an illegal rally. And lastly, a copy of a *Perintah Larangan* obtained from a magistrate was duly post at the court premises. In light of all these steps having been taken by the police, the court is satisfied not only that that the prosecution had established that the HINDRAF assembly on 25 November 2007 was an illegal assembly but also that the information about the proposed assembly or rally not having been issued with a licence had been duly disseminated to the public at large.

[20] As far as the second ingredient is concerned, the evidence of PW19 and PW20 would clearly establish the presence of the appellant at the unlawful assembly.

[21] Learned counsel for the appellant has submitted that the evidence of PW19 and PW20 are 'dodgy'. After carefully scrutinising their evidence, the court is unable to find any aspects of their evidence to be dodgy. The court finds that the very nature of their evidence, namely, that they had observed the appellant before attempting to apprehend him, that the appellant in an attempt to evade arrest had rushed towards a water cannon and had had 'pautkan' or hugged the cannon. The court is of the considered view that this incident is not something which PW19 and PW20 would have forgotten or could have mistaken. The court is of the view that what the appellant had done was something which was so unusual that it could not have been dreamt up or concocted. In light of the fact that PW14 had testified that a total of seven water cannons were deployed in this incident, the court is of the considered

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view that even if the many photographers present had failed to capture a picture of the appellant hugging the water cannon, it does not mean that the incident had not happened. In any event, on this score, the court is minded of the case of *Public Prosecutor v Mohamed Ali* [1962] 1 MLJ 257 where Thomson CJ had stated as follows:

> When a Police witness says something that is not inherently improbable his evidence must in the first instance be accepted. If he says he saw a cow jumping over the moon his evidence is, of course, not to be accepted, but if he says he saw a cow wandering along one of the main streets of Kuala Lumpur (the sort of thing we all see every day of our lives) there is not the slightest justification for refusing to believe him. Of course if his evidence is contradicted by other evidence or is shaken by cross-examination then it becomes the business of the Magistrate to decide whether or not it should be accepted. In the absence of contradiction, however, and in the absence of any element of inherent improbability, the evidence of any witness, whether a Police witness or not, who gives evidence on affirmation, would normally be accepted.

[22] Apart from the fact that the court finds the evidence of PW19 and PW20 not inherently incredible, there is the added fact that their evidence corroborated each other. Simply put, the court sees no reason whatsoever to disbelieve that the appellant was in the middle of the unlawful assembly and had attempted to avoid arrest by running to, and clinging on or hugging a water cannon.

[23] The court is of the view that the presence of the investigating officer at the trial may well have tied up a few loose ends and answered a few unanswered questions. However, taking into account the nature of the charge against the appellant and the nature of the evidence adduced by the prosecution in this case, the court is of the considered view that *in the circumstances of this case*, the failure to call the investigating officer is not fatal to the prosecution case. In light of the foregoing, the court finds that this ground of appeal to be without basis.

[24] Further to the above finding, the court is of the view that the learned HMS was not in error in finding that a prima facie case had been made out and thus calling for the appellant to enter upon his defence.

[25] At this juncture, the court notes the submissions of learned counsel for the appellant that the facts had only established a prima facie case but not a case beyond reasonable doubt. From this submission, the court understands that learned counsel is arguing that the appellant's defence had raised a reasonable doubt and hence the prosecution would have failed to make out its case beyond all reasonable doubt. Is this so? To answer this question, the court has carefully

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perused the evidence that was given by the appellant and his witnesses during the hearing.

[26] In brief, the appellant, Murugan a/l Muniandy, testified that he had lived in Ampang for about 13–14 years before the incident. On the night of 24 November 2007, he had helped his friend named Raj to man a car-park at Lebuh Ampang from 5–6pm to 5.30am the next day. He had finished work at about 6am on 25 November 2007. He had taken his breakfast at about 6.30-6.40am. He wanted to go back home but at that time of the morning, there was no public transport.

[27] The appellant testified that he had then started walking in the direction of Ampang. At that time he saw many groups of people gathered together and many others who were walking. When he reached the vicinity of KLCC with Avenue K, he was stopped by a male Chinese who told him that he could not proceed to Jalan Ampang. He denied that the Chinese man had told him why he could not proceed to Jalan Ampang. He claimed that when he had shown his address in his IC to the Chinese man and explained that he had just finished work and needed to go home to sleep, he was allowed to continue with his journey. He denied that there were alternative routes back to his house without bypassing that particular route that he took.

[28] After passing KLCC, he saw many people gathered on the left side of the road. And because there were many people, he crossed the road and walked on the divider. When he approached the Ampang Park Shopping Complex, he saw two or three persons sitting on the road. The area was clear and thus, he crossed the road and walked nearby to the Shopping Complex. He claimed he heard a noise like a 'letupan', looked behind him but did not see anything. During cross-examination, he claimed that after the letupan, he heard screams and saw many people running here and there. When he arrived at the Shopping Complex, a few Malay men ran towards him and caught hold of him. They were not in uniform. The appellant said that he asked the why he was being arrested but they had said that he would be told in the balai. The appellant was handcuffed and brought to the Balai Polis Jalan Tun Razak where he had surrendered his identity card. Thereafter, the appellant and some 15–20 others who were arrested were taken by police truck to Pulapol.

[29] The appellant had called two others in support of his case. Haris Fathilah bin Mohamed Ibrahim ('DW2') is an advocate and solicitor. On 25 January 2007, he was part of the Bar Council observation team to observe and report on the HINDRAF rally. The team was headed by Edmund Bon (DW3). They had started walking from the Dang Wangi station at Wisma Denmark along Jalan Ampang. When they reached the junction with KLCC, they were hit with tear gas as well as jets of water. They then retreated to Jalan

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Yap Kwan Seng. They saw police activities in Jalan Ampang in front of the KLCC and thus returned to Jalan Ampang.

[30] DW2 maintained that during his hour of monitoring, he was looking out for but did not see any sign of a pasted court order.

[31] Similarly, Edmund Bon Tai Soon (DW3) confirmed that he was leading a team of about 15 lawyers as Bar Council observers at the HINDRAF assembly. He corroborated the testimony of DW2 that during their walkabout that morning, he did not see a copy of the court order (P13) pasted anywhere along the route.

[32] The court has considered the appellant's submission that the learned HMS had used the wrong test when he found the appellant guilty and convicted him at the end of the defence case. Reference was made to the *alasan penghakiman* at p 26 of the appeal records where the learned HMS had used the 'prima facie' test at that stage. The court is of the considered view that this is but an inadvertence, a mere clerical error and that too much should not be made of it. The fact that this is but an error is reinforced in p 22 of the appeal records where the learned HMS had correctly stated that he had applied the prima facie test at the close of the prosecution case.

[33] The court had carefully considered the defence of the appellant in considering whether the appellant's explanation can be accepted or believed and whether it raises a reasonable doubt in the court's mind as to his guilt. As has been held in the case of *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16, the doubt must be a reasonable doubt which arises from the evidence or the want of evidence. It is not an imaginary or fanciful doubt or a conjecture which is unrelated to the evidence.

[34] The court is well aware that the burden of proof rests throughout on the prosecution to prove its case beyond reasonable doubt. The burden does not shift to the appellant to prove his innocence. All that the appellant is required to do is to raise a reasonable doubt.

[35] The learned deputy has submitted that the defence of the appellant was but a mere denial. This is denied by counsel for the appellant who submitted that the appellant's defence is that he was present in innocent circumstances. s 27(5B) of the Police Act 1967 which deals with this defence reads as follows:

> In a prosecution for an offence under subsection (5) of attending or being found at an assembly, meeting or procession which is an unlawful assembly, it shall be a defence that the presence of the person charged came about through innocent circumstances and that he had no intention to be otherwise associated with the assembly, meeting or procession.

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[36] The court has carefully considered and weighed the appellant's evidence as against the prosecution's case in considering whether his defence has indeed cast a doubt as to the truth of the prosecution's case. Regretfully, the court finds that it has not. Apart from stating that he was on his way home from work until the early hours of the morning on 25 November 2007, that there was no public transportation back to his house in the Ampang area so early in the morning, and thus he had to walk home, the rest of his evidence as regards his arrest is but a denial of the prosecution case.

[37] The court notes the appellant's own evidence as to the crowds of people gathered all along the road such that he had to walk along the centre divider. He cannot have been unaware that something was happening. The presence of the FRU trucks and water cannons would also have alerted him that something was afoot. Even supposing for a moment that the appellant had really just finished work and 'chanced' to be at Jalan Ampang at the exact time when the police were attempting to disperse the crowd, the court is of the view that the appellant's defence had totally not accounted for the evidence of PW19 and PW20 as to his challenging the police officers to arrest him, and then rushing off to hug the water cannon to avoid being arrested and taken away. As such, the court finds that the learned HMS was not in error when he found that the defence of the appellant had failed to cast a reasonable doubt as to the truth of the prosecution case. It follows therefrom that the learned HMS was not in error when he found the appellant guilty and convicted him on the charge under s 27(5) of the Police Act 1967.

[38] In respect of the sentence, the appellant submits that the learned HMS had failed to consider the appellant's plea in mitigation that he is a first offender with no previous conviction record. In this regard, the court notes that an offence under s 27(5) of the Police Act 1967 is punishable under s 27(8). Section 27(8) of the Police Act 1967 reads as follows:

> A person who is guilty of an offence under this section shall be liable on conviction to a fine of not less than two thousand ringgit and not more than ten thousand ringgit and imprisonment for a term not exceeding one year.

[39] The appellant was sentenced to a fine of RM2,000 in default to 30 days' imprisonment. The fine of RM2,000 is the minimum fine under s 27(8). The appellant was also sentenced to 14 days' imprisonment. Even considering the appellant's clean record, the sentence of 14 days' imprisonment is a far cry from the maximum imprisonment sentence of one year. In light of the evidence adduced as regards the conduct of the appellant at the illegal assembly, the court is of the considered view that the sentence imposed on the appellant upon his conviction after a full trial is not manifestly excessive.

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[40] Accordingly, the appellant's appeal against both conviction as well as sentence is dismissed.

Appellant's appeal dismissed.

Reported by Kanesh Sundrum